Supreme Court, U.S.
FILED

05-771 OCT - 4 2005

OFFICE OF THE CLERK

Docket No.

IN THE
SUPREME COURT of the UNITED STATES

CARL W. COSIO,
Petitioner,

v.

BARBARA BOYD KEITHLY, LEROY H. MERKLE, JR., TIMOTHY P. MORAN, AND TAMPA HEALTH CARE CENTER,
Respondents.

On Writ of Certiorari from The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule 1.420(e) of the Florida Rules of Civil Procedure (which provides for the dismissal of lawsuits without a trial), and the status of Florida law regarding the Rule, run afoul of the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the prior proceedings and to this proceeding.

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CITATIONS OF THE REPORTS OF THE OPINIONS AND ORDERS

The opinion of the Florida Supreme Court is reported at 907 So.2d 1170 (2005) (a copy is attached as Appendix Document # 10). The opinion of the Second District Court of Appeal of Florida is reported at 889 So.2d 1017 (2005) (a copy is attached as Appendix Document # 9). The Order of the Circuit Court for, and in, Hillsborough County, Florida dismissing Petitioner's lawsuit is unreported (a copy is attached as Appendix Document # 8).

STATEMENT OF JURISDICTION

The decision of the Florida Supreme Court denying Petitioner's Petition to Invoke Discretionary Jurisdiction of the Court was entered on July 6, 2005. This Petition for Writ of Certiorari was filed within 90 days of the decision of the Florida Supreme Court, as required by Rule 13 of the Rules of the Supreme Court of the United States.

The Petitioner contends that this Court has jurisdiction to review the decision of the Florida Supreme Court pursuant to Rule 10(b) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE INVOLVED

Rule 1.420(e) of the Florida Rules of Civil Procedure:

> All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 1 year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending.

STATEMENT OF THE CASE

A. Activities prior to the subject 1 year period.

On or about August 27, 1999, Petitioner filed a Complaint and lawsuit against Respondent Timothy P. Moran. On or about September 22, 1999, Petitioner filed a Complaint and lawsuit against Respondents, Timothy P. Moran, Leroy H. Merkle, Jr., Tampa Health Care Center, and Barbara Boyd Keithly.

While motions to dismiss and/or to strike filed by all Respondents were pending in the second action listed above, on May 1, 2002 the trial court entered an Order consolidating the two actions.

On July 16, 2002 the Petitioner filed and served an Amended Motion to Amend the Second Amended Complaint that included as an Exhibit a proposed Third Amended Complaint that had been revised, as a result of the consolidation Order, to include all causes of action from both lawsuits (the Amended Motion was received by the clerk of court on July 18, 2003).

B. Activities within the subject 1 year period.

The following activities are all activities of record within the subject 1 year period that began to run on either July 16, 2002 (the date of service of the Amended Motion), or on July 18, 2002 (the date that the Amended Motion was received by the clerk of court):

1. on August 18, 2002 a Joint Stipulation for Substitution of Counsel was filed regarding the substitution of

counsel for Respondent Tampa Health Care Center;

2. on August 23, 2002 an Order on Joint Stipulation for Substitution of Counsel was signed and entered;

3. on September 30, 2002 the Petitioner's counsel and two of the *pro se* Respondents, Leroy H. Merkle, Jr. and Timothy P. Moran (that are also members of the Florida Bar), appeared at a hearing in the case. Either immediately before or after that hearing and while still at the courthouse, these two (2) Respondents signed the Joint Stipulation that was intended to resolve the Respondents' pending motions to dismiss and/or to strike and to also resolve the Petitioner's motion to amend;

4. on or about February 5, 2003 counsel for Respondent Tampa Health Care Center filed a Notice of Unavailability asserting that said counsel was not available for the period from April 18, 2003 to April 30, 2003 and therein requested that no hearing, discovery action, or other matters whatsoever be scheduled during this period;

5. on or about June 24, 2003 the trial court entered an Order Scheduling Case Management/Dismissal Docket and all counsel were ordered to attend a case management conference scheduled for August 13, 2003; and

6. on July 16, 2003 (<u>exactly</u> 1 year to the date after Petitioner's Amended Motion to Amend the Second Amended Complaint was served), Respondent Tampa Health Care Center served a Motion for Dismissal for Failure to Prosecute Under Florida Rules of Civil Procedure 1.420(e) (this motion was received by the clerk of court on July 18, 2003, which is <u>exactly</u> one year to the date after Petitioner's Amended Motion to Amend

the Second Amended Complaint was received by the clerk of court).

C. Activities after the subject 1 year period.

On August 13, 2003 at the case management conference, the trial court inquired into Respondent Tampa Health Care Center's pending motion to dismiss for failure to prosecute. Specifically, the trial court asked all counsel if there had been any interaction between Petitioner's counsel and any of Respondents' counsel since the service and/or filing of the Amended Motion to Amend the Second Amended Complaint. Respondents Timothy P. Moran and Leroy H. Merkle, Jr. both advised the trial court that there had been no affirmative interaction whatsoever with Petitioner's counsel over the subject one (1) year period. Petitioner's counsel disagreed and advised the trial court of the Joint Stipulation and of his successful and unsuccessful attempts, within the subject year, to obtain the signatures of all attorneys on the Joint Stipulation. Because of the disagreement between counsel as to whether the Joint Stipulation had been signed during the subject one (1) year period, the trial court rescheduled, to September 16, 2003, the case management conference and the hearing on the Rule 1.420(e) motion and ordered counsel to bring the Joint Stipulation to court on September 16, 2003 so that she could see when it was circulated and signed.

On or about September 8, 2003 the Affidavit of Petitioner's trial counsel was filed and therein Petitioner's trial

counsel described, and set forth, the many out-of-court activities that are, pursuant to Florida law, to be considered 'record' activities.

At the hearing on September 16, 2003 and after Petitioner's counsel had proven that the Joint Stipulation had been signed within the subject one (1) year period, the trial court stated 'well the only thing I wanted to do was get proof of the date of the stip'. Although the trial court had rescheduled the case management conference and hearing for a UMC hearing (a ten minute hearing), the trial court interestingly stated that '[t]his is not an appropriate motion for a UMC docket'. The 1.420(e) motion was rescheduled to be heard again on October 9, 2003.

On or about October 2, 2003, the Affidavit of Petitioner was filed and therein he asserted as 'good cause' the following: that after lead counsel George P. Kickliter withdrew from the case, he was forced to pay more money to his two other attorneys; that then one of his two remaining attorneys (Mr. Terrence Laster) filed a motion to withdraw and stopped working on the case; that he and his remaining attorney attempted to contact Mr. Laster to obtain details about his alleged medical problems and his alleged need to leave the state; that he and his remaining attorney wanted to ascertain whether Mr. Laster could assist with the case from the state where he now lived; and that Mr. Kickliter and Mr. Laster are no longer licensed to practice law in Florida as a result of, in part, their conduct and actions in representing him in the action (although Petitioner contends that 'good cause' existed, because he understands that he cannot

seek review with this Court of the trial court's 'good cause' determination, he will be making no arguments to this Court in that regard).

At the hearing on October 9, 2003 the trial court ruled that there had been absolutely no record activity within the subject year and that Petitioner had not shown 'good cause' for the lack of record activity. As a result of the above findings, the trial court advised that it was dismissing the action pursuant to Rule 1.420(e).

On October 16, 2003, a written Order on Defendants' Motion to Dismiss for Lack of Prosecution was entered.

D. Appellate proceedings to date.

On November 17, 2003, the Petitioner timely filed a Notice of Appeal and appealed the trial court's October 16, 2003 Order to the Second District Court of Appeal of Florida.

On January 5, 2005 the Second District Court of Appeal affirmed the Order and dismissal but certified conflict with the First District Court of Appeal and Dye v. Security Pacific Financial Services, Inc., 828 So.2d 1089 (Fla. 1st DCA 2002).

On February 2, 2005 the Petitioner invoked, in a timely manner, the discretionary jurisdiction of the Florida Supreme Court to review the decision of the Second District Court of Appeal entered on January 5, 2005.

On July 6, 2005 the Florida Supreme Court entered an Order declining to exercise jurisdiction and denying Petitioner's Petition for Review.